IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.1002 OF 2003

B.A.D'Silva & Ors. ..Petitioners

Vs.

The Director General of
Shipping and Ors. ..Respondents

Mr.Mihir Desai for the petitioners

Mr.S.K.Talsania i/b Sanjay Udeshi and Co. for the respondents

CORAM : S.U.KAMDAR, J
DATED : 21ST APRIL, 2006

P.C.:

1. The present writ petition is filed challenging the order passed by the Tribunal dt.29.7.02 and for further direction that the respondent company should forthwith appoint the petitioner workmen on their earlier posts with continuity of services and all consequential benefits. Some of the material facts of the present case are briefly enumerated as under:

2. The petitioners are the Purser Officers and

Radio Officers working with respondent no.3. They are the permanent employees of the respondent no.3 and are in employment from sometime in 1972 onwards. On 15.12.00 the services of the petitioners were terminated and they were retrenched after payment of retrenchment compensation. It is the case of the petitioners that after the retrenchment respondent no.3 recruited certain other Pursers and Radio Officers on different pay scale. It is the case of the petitioners that during the period 1994-96 there was a memorandum of settlement between the parties known as INSA agreement. Under the provisions of the said 1994-96 agreement, in so far as Pursers are concerned, they were governed by the rule 22, 24 and 25 of the said INSA agreement for the period 1994-96. In so far as retrenchment is concerned the provisions of clause 162 of the said rules were relevant and applicable. Sometime in or about 1998, the said INSA agreement was renewed and new settlement agreement was arrived at between the parties. In so far as Pursers and Radio Officers are concerned who were manning the vessels, the provisions which are introduced under 1998-00 INSA

agreement reads as under:

> "Clause 114 For all categories of vessels manning will be as per Safe Manning Certificate requirement of the Maritime Administration.
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> Clause 116 Radio and Purser Officers under the Age of 35 years will be given facilities for retraining. If such officers refuse the offer of retraining, retrenchment/redundants compensation will not be payable. There will be no retrenchment. However, if any retrenchment is required, same to be done in consultation with the MUI. Radio and Purser Officers who do not meet the qualifying standards set by the D.G. of Shipping will also be eligible for the retrenchment compensation as per the provisions of the Clause 112B.
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> Clause 169 The Company may terminate the services of an officer in the event of his services becoming surplus to requirement as a result of reduction in Company's fleet or for want of employment for ships. In agreement with the Union, the Company may also terminate the services of an officer in circumstances other than those mentioned herein and excepting those provided in Clause 173. I either case, the Company shall give him three months notice in writing effective from he date of receipt by the Officer. No notice of termination shall, however, be given when he is on medical or unpaid examination leave. An officer served with notice of termination shall be released from service on the expiry of notice period of three months, or should his vessel at the expiry of the notice, be at sea or at foreign port, as soon as possible on his vessels' arrival at the first Indian port.
>
> Clause 188 The Ship owners acknowledge

> the right of the Officers to participate in Union activities as per ILO Convention Nos.87 and 98.
>
> Noting contained in this Agreement shall adversely affect or take away or reduce any privilege and other benefits expressed, implied or currently enjoyed by Officers, except in so far as they have been amended under this Agreement.

3. It is the case of the petitioners that under the terms and conditions of the INSA agreement 1998-2000 the services of the petitioners could not have been terminated by way of retrenchment unless the provisions of clause 116 are duly complied with. It is the case of the petitioners that under clause 116 what is required is prior consultation with the Maritime Union of India and thereafter only there could have been a termination. Since the reference was contrary to the provision, a dispute was raised and the same was referred to the Tribunal constituted under sub-section 5 of section 150 of the Merchant Shipping Act, 1958. The Tribunal while considering the aforesaid case has come to the conclusion that the retrenchment is legal and valid. It has been held by the Tribunal that under the original

provisions INSA agreement of 1994-96 clause 23, 24 and 25 govern the service of petitioners employees which were deleted by virtue of new INSA agreement for the period 1998-00 by virtue of incorporating clause 114 thereof.

4. On the other hand, the contention of the petitioners was that by virtue of clause 136(b) of 1998-00, clause 24 and 25 continue to remain in operation. Alternatively, it has been argued by the petitioners before the Tribunal that even under the new agreement under clause 116 there is a necessity of prior consultation permission of union. However, the Tribunal has held that there is no such requirement of consultation and Tribunal has passed the impugned order which has been challenged before me.

5. In my opinion, a short question which arises before me is as to the interpretation of clause 116 of 1998-00 settlement agreement which admittedly governs the relationship between the parties. Clause 116 provides that Radio and Purser Officers under the Age of 35 years will be given

facilities for retraining. If such officers refuse the offer of retraining, retrenchment/redundants compensation will not be payable. There will be no retrenchment. However, if any retrenchment is required, same to be done in consultation with the MUI. The said clause 116 further provides that Ratio and Purser Officers who do not meet the qualifying standards set by the D.G. of Shipping will also be eligible for the retrenchment compensation as per the provisions of the Clause 112B.

6. The learned counsel for the petitioners has contended that in view of the language of clause 116 and on its true and correct interpretation it would mean that those Radio and Purser Officers who are under the age of 35 years will be retrained and in those cases there will be no retrenchment. It has been submitted further that the said clause further provides that if those officers do not accept retraining then they will be retrenched without payment of retrenchment compensation. It is the case of petitioners that however, in cases of person above 35 years, retrenchment as permitted

under clause 116 can only be done with proper consultation with Maritime Union of India. It has been submitted that there is no consultation at all with MUI in the present case before effecting retrenchment and thus the same, is invalid in law and is consequently required to be set aside.

7. On the other hand, the respondents have submitted that though it is true that the terms and conditions in so far as retrenchment of Purser and Radio Officers is concerned, the same governed by clause 116 and it is not governed by clause 169. It is because clause 169 is in respect of general categories whereas Purser and Radio Officers are special category as provided under clause 116. However, he submits that clause 116 requiring consultation is only in respect of those Radio and Purser Officers who have not attained the age of 35 years. It has submitted that clause 116 in so far as those Radio and Purser Officers are concerned who have attained age of 35 years empowers respondent no.3 to retrench them from service without any consultation with MUI. He has further submitted that under clause 116 the company has an

absolute power to retrench the employees who have attained the age of 35 years without any consultation with the Union.

8. Alternatively, the learned counsel for respondent nos.3 has contended that clause 116 is bad in law and void by virtue of provision of s.27 of the contract Act inasmuch as it seeks to restrict the fundamental right of the respondent to carry on trade and business of his choice as contemplated under Article 19(1)(g) of the Constitution of India and thus, the said clause being ultravirus the provision of Article 19(1)(g) of the Constitution is an unreasonable restrain and thus, void in view of s.27 of the Contract Act which provides that any contract in restrain of trade is bad in law.

9. In support of the aforesaid contention, the learned counsel for the respondent no.3 has relied upon the judgment of the learned single Judge of this court in the case of Mumbai Mazdoor Sabha and another Vs. S.A.Patil and ors. reported in 1993(3) Bom. C.R.265 and contended that in view of

the aforesaid judgment provision of clause 116 is void by virtue of the fact that it is hit by the provisions of s.27 of the Contract Act.

10. Both the learned counsel has placed before me the only point pertaining to the interpretation of clause 116 of the settlement agreement 1998-00 and or validity or invalidity thereof. Before dealing with the issue of interpretation of clause 116, I am of the view that I must deal with an issue of validity of the said clause. In my opinion, the provision of clause 116 providing for consultation with the union before effecting the retrenchment of the employees who are the Radio and Purser Officers does not place any unreasonable restriction on the respondent no.3's right to carry on any trade or profession as guaranted by Article 19(1)(g) of the Constitution of India. Clause 116 does not provide for any embargo on the respondent no.3 in exercising its right of retrenchment which is provided by the Statute. It only requires prior consultation with Union and it does not even provide that the view of the Union is binding on the respondent no.3. It may as well if it deems

fit reject the same. However, the discretion vested in respondent no.3 to accept or reject the view of the union does not mean that they need not consult the union even though it is expressly provided by clause 116 thereof.

11. In so far as the judgment of the learned single Judge is concerned, I am of the opinion that in the instant case of retrenchment the said Judgment of is not applicable. That was a case where right to retrench an employee was circumscribed by a prior consent of the union and it provided that there can be no retrenchment when the consent is refused by the Union. The fact that the consent was a condition precedent and in absence of consent the right of the employer to retrench the employees was taken away would amount to unreasonable restriction because the employer cannot exercise the said right of retrenchment conferred under the statute by virtue of refusal to give consent by the union and consequently in that case court held such a provision is hit by s.27 of the Contract Act. The present case is not a case of such an embargo so as to affect the right of an

employer to effect retrenchment if he so desires. A mere consultation is not an unreasonable restriction and therefore, the aforesaid judgment has no application to the facts of the present case. The contention of the respondent no.3 in respect of validity of clause 116 is accordingly required to be rejected.

12. Now turning to the interpretation of clause 116 of the INSA Agreement 1998-2000. I am of the opinion that on true and correct interpretation of the said clause, it is clear that the clause requiring consultation of the Union is not restricted only to those employees who are restricted of the 35 years age and below. In fact clause for consultation provides for the aforesaid word ’any retrenchment’ and therefore by using of the word,clause 116 has been vide enough to cover all cases of retrenchment where a person who is retrenched by the respondent is below age of 35 years or not. In fact the clause expressly provides that there will be no retrenchment in case of Radio and Purser Officers who are retrenched below 35 year. It also further provides that if

the employee who is below 35 years of age and do not accept the training then he can be retrenched without payment of retrenchment compensation. Thus, on true interpretation of clause it is clear that employees below the 35 years of age should be retrained and kept in service and there should be no retrenchment at all. In cases where officers do not accept the training offered then they should be retrenched without payment of compensation. Thus, right to retrench without consultation of the Union is conferred only in respect of those officers who do not accept training and is below 35 years age. In respect of other employees prior consultation of union is mandatory. Thus, it is clear that retrenchment after consultation of the union is prescribed under clause 116 in respect of retrenchment of Radio and Purser Officers whether a person is below the age of 35 years or above the age of 35 years except those cases where an officer has refused the training though offered.

13. In my opinion, in the present case when admittedly, there is no consultation prior to retrenchment order is issued then such an order

being not in confirmity with clause 116 of the settlement is required to be quashed and set aside. The Tribunal has erred in holding that by virtue of provision of cl.114, 116 r/w clause 169 together, it is clear that person can be retrenched without any consultation. Clause 114 only provides that an introduction of new manning system which has been introduced for the first time and does not provide for any retrenchment provision thereunder. In so far as clause 169 is concerned, I am of the opinion that the same has no application whatsoever in the present case because clause 169 provides for terminating the service of Officer in the event of service becoming surplus and provides for further terms and conditions thereof. When there is a special provision for retrenchment in respect of Purser and Radio Officers, it is not permissible to rely upon general provisions of clause 169 of the said settlement of 1998-00. Even both counsels has submitted that a case of retrenchment in the present case is governed by clause 116 and not 169. The Tribunal has therefore erred in interpreting clause 114, 116 r/w clause 169 of the said settlement period 1998-00. In any event, even on

reading of the three clauses together, it is clear that the consultation in respect of retrenchment of Radio and Purser Officers is necessary and is not restricted only to Purser and Radio Officers below the age of 35 years.

14. In the light of the aforesaid, the present petition must succeed. Impugned order dt.29.7.02 is set aside with direction that respondent company to forthwith appoint the petitioner workmen on their earlier posts with continuity of services and all consequential benefits. In so far as back wages is concerned, I am of the view that on the facts and circumstances of the present case, respondent no.3 will pay only 25 % of the back wages to the petitioner. However, it is made clear that it will be open to the respondent no.3 to retrench the petitioner after complying with the requirement of clause 116 of the settlement period 1998-00. Petition disposed of accordingly. However, there shall be no order as to costs.